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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 403

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, Debtor,
Petitioner,

vs.

NEAL WILEY, Respondent.

PETITION FOR WRIT OF CERTIORARI To the Supreme Court of Arkansas and BRIEF IN SUPPORT THEREOF.

THOS. T. RAILEY,
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THOMAS B. PRYOR,
Attorneys for Petitioner.

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor (appellant in the court below), respectfully presents:

I.

SUMMARY STATEMENT OF CASE

This is a petition for a writ of certiorari to the Supreme Court of Arkansas to review the decision and judgment entered in the above cause on May 6, 1940, and petition for rehearing denied on June 10, 1940, and said judgment became final on said date.

Petitioner is the duly appointed, qualified and acting Trustee of the Missouri Pacific Railroad Company, a debtor in the reorganization proceedings of the Missouri Pacific Railroad Company, pending in the United States District Court for the Eastern Judicial District of Missouri, under the provisions of Section 77 of the Bankruptcy Act.

This suit was brought by the respondent against petitioner to recover damages under the Federal Employer's Liability Act. No question was raised as to the respondent being engaged in Interstate Commerce at the time of his injury. Respondent was employed by petitioner as a night watchman upon a bridge located in the State of Oklahoma that had been damaged by a wreck occurring at that point a few days before, and on the night of the 13th of October, 1937, while so engaged, he sustained a serious injury and suit was filed in the Crawford County, Arkansas Circuit Court on the 5th day of December, 1938, in which it was alleged that:

> " * * * a large and heavy piece of coal, slate or debris was caused and permitted to fall from a car on said train, striking and injuring plaintiff."

On March 3, 1939, after answer had been filed, respondent (plaintiff) filed an amendment to his complaint, alleging:

"* * * that the defendant through its said bridge supervisor and foreman carelessly and negligently directed and required plaintiff to so work in said place when the defendant well knew that on account of the conditions as described in plaintiff's complaint that there was danger of coal, debris or other materials being thrown and caused to fall from said train and strike one so situated, which fact was unknown to the plaintiff, and that the said defendant through its said supervisor and foreman carelessly and negligently assured plaintiff that it was safe for him to so work and be in such place; and plaintiff further says that the defendant's fireman or some other employee of the defendant * * * was carelessly and negligently shoveling, handling and moving said coal on said train as the train approached the place where plaintiff was working and where defendant's employees knew he was working, and thereby caused and contributed to causing a large and heavy lump of coal, rock and debris to fall and be thrown from said train and to strike and injure the plaintiff."

Engineer on engine and brakeman riding in cupola of caboose testified that when the only freight train passed going north during the night plaintiff was injured that they saw him lying by the side of the track near a fire and that the train was not flagged by him, as alleged in the complaint and testified to by him.

Defendant filed answer in which assumed risk was pleaded as a defense.

Plaintiff testified that he is twenty-four years old, a man with a family and that he worked extra for the Trustee of the Missouri Pacific Railroad Company for three years; that he was bridge watchman at the time of his injury; that he heard a freight train whistle and that when it came around a curve about three hundred yards from the bridge that he noticed that it never

checked its speed; that there was a slow order over the bridge which required the speed to be reduced to five miles an hour; that he had been instructed by the Bridge Superintendent when a train exceeded its speed limit "to hold a red light up" which was furnished to him for that purpose; that as the freight train approached he displayed his red light and the engineer applied the brakes and that the train gave a big jerk and that he looked up and about that time a piece of coal fell off of the tender and he tried to dodge it, and that's the last thing he ever knew; that the train was about three hundred feet from him when he displayed his red light; that he was afterwards taken to a hospital in Fort Smith, and then to Little Rock, and finally to St. Louis. At Little Rock a written statement was obtained from him in which he stated that:

> "He was carrying a red and white lantern * * * as the engine of this train passed him he waved a white light at the engineer and that is the last that he remembered until he came to himself some time later * * * ; that he could not say what caused him to be knocked out, but learned later that the foreman said that he found a large piece of slate near where he was lying. * * * he was standing out in the open at the time and did not have a chance to see anything on the side of the train and could not say whether or not there were any swinging doors or anything sticking out or hanging down * * * as stated the engine was just passing him and that is all he remembers." (R. 51)

As shown by the record, the first suggestion that he was struck by a lump of coal was when he filed an amendment to his complaint March 3, 1939. Numerous witnesses testified that they had talked to the respondent (plaintiff) and that at all times he disclaimed any knowledge as to how he was injured.

The Supreme Court of Arkansas in its opinion states:

"Counsel for both the appellant and appellee have proceeded upon the theory that the case was one arising under the Federal Employer's Liability Act and that there can be no recovery unless there was proof of a substantial nature establishing negligence on the part of the defendant, the appellant here, and it is not contended on the part of the appellee that he is entitled to any presumption of negligence arising out of the fact that he was injured by the running or operation of the train. Some of the undisputed matters in relation to this accident are to the effect that plaintiff was employed as watchman to remain at or near the end of the bridge, and that after the train had passed over the bridge it was his duty to go upon it and inspect the same for the purposes of determining if any of the supports placed there after there had been a wreck had become loosened or had given away by reason of the heavy weight or strain or vibration in the operation of the train over the bridge, and it was his duty to replace and drive in wedges used for the purpose of furnishing additional supports and strengthening the bridge after it had been damaged in a recent wreck occurring at that point. It was admitted that on account of this damaged and weakened condition of the bridge all trains had 'slow orders,' that is to say, that they were to approach and cross over the bridge at a speed, some witnesses said, not in excess of five miles an hour, others at a rate not in excess of ten miles an hour. * * * He says that he was standing seven or eight feet away from the track as the train passed at the time he was injured; that he had placed himself in that position in an effort to signal the engineer in order to cause him to moderate his speed in approaching the end of the bridge. * * * and, under the evidence appearing in this record, he was the only witness who knew any of the particular facts and circumstances causing him to be hurt. His right of recovery must be deter-

mined almost solely from the events and facts he has been able to detail in relation thereto. The appellee's statement as to the manner in which he was injured is to the effect that as he stood near the railroad track, seven or eight feet away, with lantern in hand, at the time of the approach of the freight train, he was giving signals to cause the engineer to reduce the speed of the train and as the engine passed him a piece of coal or slate, or other heavy object rolled off or fell from the top of the tender, or was thrown therefrom and that it struck him on the head; that he saw the object as it was thrown or jolted, or fell from the tender where the coal is loaded so as to be accessible to the engine, that although he saw it start he was unable to avoid being struck by it. The effect of his testimony was that the engineer in attempting to slow down by application of brakes caused this coal to roll off or fall at this particular time and place. * * *

"We do not consider, however, that the burden is upon plaintiff to explain with minute detail the particular motion, or jolt of the train, if there was any, that may have caused a piece of coal to fall from the tender, from the top or near the outer edge thereof, the place or point from which the plaintiff says this particular missile came that struck him on the head. If there was negligence in loading the coal or any part of it was so placed that it might have fallen off or that it would later fall off and cause the particular injury complained of, we cannot say now, as a matter of law, that a duty devolved upon the appellee at the time of the trial to make an explanation of all the facts that may have been involved causing the particular accident.

"All of us know from observation that locomotives fueled by coal are ordinarily loaded at the coaling stations to capacity and that along the right-of-way, particularly near these coaling stations, lumps of coal sometimes roll off, and may be found near the tracks of a. such railroad companies. Nor

is it extremely unusual to find or see lumps of coal upon the right-of-way of the railroads perhaps considerable distances from the coaling stations.

"Indeed, it appears that coal that has fallen from the top of the tenders is not regarded as the result of a particularly wasteful practice, but probably by the unfortunate poor who live nearby it seems to be considered an involuntarily contribution. * * *

"So, we think, the jury was warranted in finding there was negligence in the operation of the train with the tender loaded as described. There was in addition some proof that the rock found at or very near the place of the accident was slate-like or the kind sometimes found in coal. Such evidence was substantial - positive - not at all impossible or even improbable, though for the most part contradicted."

At the conclusion of the evidence the defendant requested the Court to "give its instruction No. 1" as follows:

"You are instructed that under the law and the testimony the plaintiff has failed to make out a case against the defendant, and you are, therefore, directed to return a verdict in favor of the defendant."

and also instruction No. 8:

"You are instructed that the plaintiff's evidence is insufficient to warrant a finding that the agents of the defendant were careless and negligent in the handling of the work at the time and place of plaintiff's alleged injury, and you will therefore find for the defendant." (R. 309)

The Court, however, gave defendant's instruction No. II among other instructions:

"You are instructed that under the pleadings and proof in this case the plaintiff at the time of his alleged injury was engaged in interstate commerce, as provided in the Federal Employers' Liability Act. And in this connection I instruct you that if you find from the testimony that the plaintiff's alleged injury resulted from the hazards incident to his employment, that then and in that event he assumed such hazards and risks, and therefore cannot recover in this action."

The jury returned a verdict for $30,000.00, the full amount for which suit was brought. The question involved is whether or not the plaintiff under the Federal Employers' Liability Act is entitled to recover.

II.

JURISDICTION

1. The jurisdiction of this court to grant the writ of certiorari is found in United States Code, Title 28, Section 344, paragraph (b), (Judicial Code Sec. 237 as amended) the Supreme Court of Arkansas being the highest Court of that State.

2. The date of the judgment in the Supreme Court of Arkansas is May 6, 1940. A petition for a rehearing was filed and denied and the judgment became final on June 10, 1940, and the Supreme Court made an order granting until September 10, 1940, in which to file petition for certiorari in this Court.

3. The complaint alleges a cause of action under the Federal Employers' Liability Act. The Supreme Court of Arkansas denied to defendant (petitioner here) the defense of assumed risk applicable under said Act and

denied to the defendant (petitioner here) the benefit of the provision of the Act which requires a plaintiff to establish by proof the negligence alleged.

4. The Supreme Court of Arkansas based its conclusion in part upon the presumption of negligence statute of the State of Arkansas, contrary to the decisions of this Court.

III.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Supreme Court of Arkansas has decided important questions involving the Federal Employers' Liability Act and said decision is in conflict with the decisions of this Court.

1. Under the Federal Employers' Liability Act this Court has held in numerous opinions that the defense of assumed risk is available as a defense in a personal injury action brought by an employee against a railroad company, and the Supreme Court of Arkansas denied petitioner this right.

2. Under the Act of Congress and the decisions of this Court the burden of proof is upon the plaintiff in a personal injury damage suit to establish the allegations of negligence in his complaint or petition by a fair preponderance of the evidence and this is a substantive right which the Supreme Court of Arkansas declined to enforce.

3. The Supreme Court of Arkansas holds in its opinion that the question of a preponderance of the evidence is a matter of procedure which is not governed by the Act of Congress. In its opinion it says:

"Having decided that evidence of a substantial nature supports the verdict we decline to enter upon a discussion of facts to decide where the preponderance lies. There is an intimation, if not an insistence that in this class of cases we should do so. Although the Federal Employers' Liability Act creates or declares certain rights permitting recoveries under conditions stated and provides that trials may be had in both state and federal courts, matters of procedure were untouched."

This Court in the case of *Pennsylvania R.R. Co.* v. *Chamberlain*, 288 U.S. 333, has held:

"The scintilla rule has been definitely and repeatedly rejected so far as the federal courts are concerned."

4. The Supreme Court of Arkansas in its opinion states:

"Prior to this time due consideration has been given to facts very similar to those appearing on this appeal. Issues arising out of careless or improper loading of coal on the tender so that a lump fell therefrom causing injuries have arisen and been decided by our own court. * * * The negligence established in the cited case is not different in kind or degree from that proven by appellee."

To support that statement two cases from Arkansas are cited in which the Supreme Court held that under the presumption of negligence statute in Arkansas that the plaintiffs were entitled to recover.

Under the Federal Employers' Liability Act and the decisions of this Court the presumption of negligence statute of Arkansas is not applicable, and therefore the opinion of the Supreme Court of Arkansas is in conflict with the opinions of this court.

This Court in *N. O. & N. E. R.R. Co.* v. *Harris*, 247 U.S. 367, has held that local prima facie statutes are not applicable in suits brought under the Federal Employers' Liability Act and the Court in its opinion also stated that:

> " * * * negligence is an affirmative fact which plaintiff must establish. * * *
>
> "These established principles and our holding in Central Vermont R. Co. v. White, 238 U.S. 507, * * * we think make it clear that the question of burden of proof is a matter of substance, and not subject to control by laws of the several states."

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Arkansas, commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in this case and that said judgment in favor of the appellee in the Court below may be reversed by this Honorable Court and your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioner will ever pray.

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